Saskatchewan
Information and Privacy
Commissioner

503 - 1801 Hamilton Street
Regina, Saskatchewan
S4P 4B4

Tel: (306) 787-8350
Fax: (306) 798-1603
Website: www.oipc.sk.ca

November 20, 2006

Honourable P. Myron Kowalsky
Speaker, Legislative Assembly of Saskatchewan
2405 Legislative Drive
REGINA SK S4S 0B3

Dear Mr. Speaker:

Re: *The Gunshot and Stab Wounds Mandatory Reporting Act*

I understand that *Bill 20, The Gunshot and Stab Wounds Mandatory Reporting Act* (Bill 20) may be scheduled for Second Reading debate in the Assembly this week.

What follows are my observations and questions generated by Bill 20. I am requesting that this be tabled in the Legislative Assembly pursuant to section 52 of *The Health Information Protection Act* (HIPA), which provides as follows:

> **52** The commissioner may:
>
> (a) offer comment on the implications for personal health information of proposed legislative schemes or programs of trustees;
>
> ...
>
> (c) in appropriate circumstances, comment on the collection of personal health information in a manner other than directly from the individual to whom it relates;
>
> ...
>
> (e) comment on the implications for protection of personal health information of any aspect of the collection, storage, use or transfer of personal health information.

Further authority for tabling this letter can be found in section 33 of *The Freedom of Information and Protection of Privacy Act* which provides as follows:

> **33** The commissioner may:
>
> (a) offer comment on the implications for privacy protection of proposed legislative schemes or government programs;

...

(d) from time to time, carry out investigations with respect to personal information in the possession or under the control of government institutions to ensure compliance with this Part.

IS BILL 20 CONSTITUTIONAL?

I have several questions about the constitutional foundation for Bill 20. I am not aware of any plan to initiate a reference to the Court of Appeal under *The Constitutional Questions Act*. Such a reference would clearly resolve these constitutional issues.

In my view, the mandatory reporting of gunshot and stab wounds is wholly collateral to the provision of health care. Bill 20 would not be seen as legislation in respect of health care because of its scheme, operation and most obviously the fact that it is not part of *The Health Information Protection Act* (HIPA) but a separate instrument. Its sole purpose, as I understand the Bill, is to achieve a criminal law purpose. If it is incidental to the administration of justice, then it would be clearly within the competence of the Legislative Assembly. If it is considered as legislation in relation to "criminal procedure" rather than legislation incidental to the administration of justice, entirely different considerations would apply. A law in relation to criminal procedure would be *ultra vires* the Legislative Assembly. There may well be a comprehensive legal analysis that has already been undertaken by the Department on this question but I am not aware of same.

Furthermore, the Supreme Court has held that, by reason of sections 7 (right to life, liberty and security) and 8 (right to be secure against unreasonable search or seizure) of the *Charter of Rights and Freedoms* (the Charter), Canadians enjoy a right of privacy in terms of personal information about them in respect to which they have a reasonable expectation of privacy.[1]

The proposed mandatory reporting of gunshot and stab wounds would likely qualify as a "seizure" of someone's personal health information (phi) and would be done without the consent of the individual. That would likely engage section 8 of the Charter.

If Bill 20 is found to violate section 8, the Province could attempt to justify the Bill under section 1 of the Charter as a reasonable limit that is demonstrably justified in a free and democratic society. To do so, the Province would have to meet the criteria in the Oakes test. That would entail having to demonstrate that the objective of Bill 20 is sufficiently important to warrant overriding a constitutionally protected right of privacy. In that respect, I accept that stabbings are an increasingly common problem in terms of law enforcement in Saskatchewan. I accept also that it is important that steps be taken to reduce the use of knives and guns to facilitate crimes and to jeopardize the life and safety of citizens.

[1] OIPC Investigation Report H2005-002, pages 65-72. Available online at www.oipc.sk.ca under the *Reports* tab.

The Province would still, however, have to show that the Bill is reasonable and demonstrably justified. I expect that this would require persuasive arguments that:

a) Bill 20 is fair and not arbitrary, carefully designed to achieve the objective in question and is rationally connected to that objective;
b) Bill 20 should impair the right of privacy as little as possible; and
c) Bill 20 should be proportionate to the objective.

I am not convinced that Bill 20 would meet the tests of rational connection, proportionality and minimal impairment that the courts will require before they could uphold a law under a section 1 Charter analysis. In fact, my opinion is that the Bill might well fail the section 1 analysis.

In the words of Professor Wayne Renke[2] in the Faculty of Law, University of Alberta:

> …mandatory reporting undermines important differences between the health system and the legal system. Medical services focus on the health of the patient. Whether the patient is good or bad, innocent or guilty, a witness or a perpetrator, is largely beside the point. The challenge is to preserve the individual's health and to respect each individual's dignity and autonomy: hence, for example, the medical emphasis on obtaining patients' informed consent to procedures. Advancing the interests of the punitive apparatus of the criminal justice system is not part of the mission of the health system. One might say that the health system is "not in the business of justice." We should avoid the notion that all of our public processes – e.g. the criminal justice system, the health care system, the economy – should be integrated, or follow the same set of principles or procedures. Overall social benefits may be achieved through different systems achieving their different results in their different ways. We see the good sense in the following passage from the 1980 Krever Report on the Confidentiality of Health Care Information, quoted by La Forest J. in the *Dyment* case[3]:
>
> > the primary concern of physicians, hospitals, their employees and other health care providers must be the care of their patients….A free exchange of information between physicians and hospitals and the police should not be encouraged or permitted. Certainly physicians, hospital employees and other health-care workers should not be made part of the law enforcement machinery of the State.

I note that no other law in Canada goes as far as Bill 20 inasmuch as this Bill captures both information about gunshot wounds and stab wounds.

---

[2] Wayne Renke. "The Constitutionality of Mandatory Reporting of Gunshot Wounds Legislation," *Health Law Review*, Volume 14, Number 1, 2005: 7.
[3] R. v. Dyment, [1988] 2 S.C.R. 417.

NEED FOR PUBLIC ENGAGEMENT IN THIS DISCUSSION

I respectfully suggest that laws that will significantly impact the fundamental rights of citizens warrant broad public input before they are enacted. I am not aware of any public consultation regarding this Bill beyond consultation with law enforcement authorities and certain health information trustees. I urge the Saskatchewan Government to ensure that steps are taken to inform the public of this initiative and to solicit feedback before Bill 20 is enacted.

PROBLEMS WITH INDISCRIMINATE MANDATORY REPORTING

I acknowledge that Bill 20 contemplates certain matters may be excluded from its scope, but this would be done by Order in Council not by statute. Without having those provisions and that kind of detail before me, it is necessary to view the collection, use and disclosure permitted by Bill 20 as indiscriminate. In the event that at some future date, regulations are developed to narrow the scope of Bill 20, they would need to be carefully assessed and evaluated.

Section 7 of Bill 20 permits regulations that can prescribe "any other information that must be disclosed to the local police service". What are the limits on "other kinds" of personal information that at some point may be determined to be convenient for law enforcement purposes to be disclosed? I am mindful of the concern raised in an article in the Canadian Medical Association Journal[4]:

> …If physicians are obliged to report gunshot wounds, the real danger is not that a few people may be deterred from seeking care, but that many others, who see that physicians have become an extension of the police force, will choose not to reveal their drug use, will refuse to say how they received an injury or will not disclose their sexual practices for fear that this information will be used against them. This will make it harder for physicians to treat some of our most vulnerable patients and represents a significant breach of trust between physician and patient.

I am not sanguine that by placing the responsibility on the hospital instead of on the individual caregiver Bill 20 avoids the problem discussed in the above quote.

Not only does this Bill appear to offend the patient autonomy model for consent long established at Canadian common law with respect to phi, but it permits even further derogation from the requirement of informed consent before collecting, using or disclosing anyone's phi.

---

[4] Merril A. Pauls and Jocelyn Downie, "Shooting ourselves in the foot: why mandatory reporting of gunshot wounds is a bad idea," *Canadian Medical Association Journal,* Volume 170, Number 8, April 13, 2004.

INSUFFICIENTLY SUBSTANTIATED RATIONALE

The following analysis is offered to the Assembly in the hope that it may be useful for Members in assessing Bill 20 and considering the practical implications. It reflects the reasons offered by proponents of this and similar legislation in Ontario and other jurisdictions both in Canada and the United States of America. The Ontario legislation captures only gunshot wounds. Similar legislation has been under consideration in the province of Alberta.

Any analysis of Bill 20 needs to start from the purpose of the legislation. There is no purpose or object clause in the Bill. Reasons put forth for such bills include: fighting organized crime, overall crime reduction, minimizing harm/danger, and 'public interest'.

We have considered these reasons or purposes in our analysis of this legislative initiative through a 'protection of privacy' filter. We understand that it is very much a question of balance. There is no absolute right of privacy for any of us. It is a question of determining when and how it may be appropriate to narrow that right.

Claim 1: Fighting Organized Crime

Saskatchewan has led Canada's provinces in terms of violent crime for the past eight years. As such, it is imperative that steps be taken to reduce criminal behaviour and its consequences.

OIPC Response

While I agree that the violence in Saskatchewan must be curbed, it is not clear to me that using health care as a vehicle to do so will be effective. I have not seen any data indicating what percentage of persons who present at a Saskatchewan hospital with a gunshot or stab wound would have been involved or victimized by organized criminal activity, nor how effective such a Bill would be in minimizing violence. In addition, the reach of the proposed legislation would seem to be far too broad. My sense is that this group would only constitute a portion of the reporting population. In other words, for every person involved or victimized by organized crime who presents at a hospital with this kind of wound, there would be many more citizens so injured with no connection with organized criminal activity. If the duty to report was discretionary for hospitals rather than mandatory it might be possible to ensure that a net designed to deal with organized crime was not also catching injuries and phi totally unrelated to organized crime.

Claim 2: Crime Reduction

There appears to be a general belief that Bill 20 will lead to a reduction in crime in our Saskatchewan communities.

OIPC Response

It has not been made clear to me what evidence exists to propel this legislation. For example, is there any indication that legislative initiatives such as the one proposed would result in a decrease in relevant violence in Saskatchewan? A 2004 *Canadian Medical Association Journal* article[5] notes that in 1997, 15% of firearm-related deaths were homicidal, and from 1997-1998, 26% of firearm-related injuries requiring hospital admission were inflicted by others. No precise figures have been put forward to indicate what proportion of that 26% require immediate protection to prevent perpetrators from intruding into hospital rooms to "finish the job". However, a 1999 study published in the *Journal of Emergency Medicine*[6] indicates that most firearm injuries are the result of impulsive acts, not premeditated revenge killings by hardened criminals – and impulsive acts rarely lead to subsequent attacks. I have seen no data or statistics regarding how many cases of "finishing the job" (whether by gunshot or stabbing) actually occur at present in Saskatchewan. The Executive Director of the University of Alberta Health Law Institute is quoted as saying there is little concrete evidence indicating that mandatory reporting actually results in a reduction in gun-related violence[7]. I understand that Saskatchewan leads Canadian provinces in terms of violent crime. However, I have seen no evidence to suggest that allowing hospitals/facilities to disclose the names of victims of such crime will deter and decrease it. And even if such evidence were forthcoming, the question of the balance between individual rights and "the public interest" would still have to be resolved (see Claim 4).

Claim 3: Avoiding or minimizing danger – HIPA 27(4)(a)

A common rationale for this kind of mandatory reporting is that mandatory reporting of certain injuries will avoid or minimize danger to the health or safety of any person, as stipulated in the harm/danger sections of health information protection legislation, such as 27(4)(a) of HIPA. The argument is that sections such as these already allow disclosure of phi without individual consent in cases of public interest, and that mandatory reporting of certain types of wounds is simply a modest extension of such provisions.

OIPC Response

Firstly, I suggest that section 27(4)(a) of HIPA cannot be used to justify Bill 20. As an exception to the principle that secondary disclosures of phi should require prior informed consent, section 27(4)(a) will be construed by the OIPC narrowly. This Bill cannot reasonably be seen as simply an extension of section 27(4)(a).

---

[5] Ibid., p. 1

[6] H Fisher and A. Drummond. "A call to arms: the emergency physician, international perspectives on firearm injury prevention and the Canadian gun control debate," *Journal of Emergency Medicine*, Volume 17, Number 3, 1999.

[7] Wayne Kondro. "Gunshot wound reporting mandatory in Ontario," *Canadian Medical Association Journal*, Volume 173, Number 3, 2005.

Secondly, HIPA already allows the reporting of anything that would constitute clear and present danger to the health or safety of any person. In other words, the concern that health care professionals may find themselves liable because they reported a situation in which there was clear and present danger to someone will not be corrected by a new act since *it is already allowed*. I note that section 27(4)(a) is a discretionary provision, so would not reasonably attract any liability if the trustee elects not to disclose, so long as the discretion was properly exercised. In the event the discretion is exercised to disclose this phi under section 27(4)(a), if it were believed by a trustee that the gunshot wound victim was in danger of being shot again in the near future, particularly in the hospital where others could be put at risk (e.g., the "finish off the job" scenario), the trustee would be well within his/her rights to disclose the relevant phi to protect that individual and others, and would not be held liable. In short, there is no need for a new act in order to allow trustees to report cases of clear and present danger. If health care practitioners are not aware of their discretionary power in this regard, this is an issue that should be addressed by further education, not further legislation.

Claim 4: Disclosure Is In The Public Interest

The public interest argument has not been sufficiently elaborated and justified in regard to the Bill, but in this case, would seem to imply that the public's interest in crime reduction is greater than its interest in privacy.

OIPC Response

Firstly, as noted above, it is not clear to me that, or how much, crime reduction would result from this Bill. Secondly, I suggest that the public interest argument can be made in favour of prioritizing privacy: just as there is a public interest in security, there is also a clear public interest in ensuring that citizens continue to have a high degree of confidence in their health care providers and the ability and commitment of those providers to protect their privacy and the confidentiality of their personal health information. That this is important to the people of Saskatchewan is reflected in the opinion survey undertaken by Saskatchewan Health and described in our Annual Report for 2005-06.[8]

What is more, as Saskatchewan proceeds to invest heavily in an electronic health record (EHR) for all citizens, the risks to privacy may increase and the corresponding need to bolster public confidence will increase. For the roll-out of the EHR to be successful, citizens need to have a high level of confidence that their privacy will be respected and that the confidentiality of their most personal information will be adequately protected.

Bill 20 evidences the phenomenon known as 'function creep'. In other words, an individual provides phi including registration information to a trustee, presumably for the purpose of diagnosis, treatment and care. For a variety of reasons, new

[8] 2005-2006 Annual Report of Office of the Information and Privacy Commissioner, p. 24

applications and uses tend to be identified for further sharing of this phi for a variety of entirely secondary purposes.

Every time the Saskatchewan Government permits a new kind of disclosure (or use or collection) for a purpose wholly collateral to the diagnosis, treatment and care of a patient, it also issues a message. That message is that there is every reason for a citizen to expect that the EHR will expose their phi to persons and agencies completely unrelated to the provision of diagnosis, treatment and care. It may be to identify truant children and track them or it may be to facilitate law enforcement activities generally or for all kinds of other purposes that may be identified and then facilitated in the future. One needs to consider whether this will undermine the kind of public confidence in the approach citizens can expect from trustees generally and the Government in particular.

The proposed Bill goes further than HIPA contemplates in the following ways: 1) in *mandating* the reporting of such wounds (rather than allowing such reporting to be *discretionary* in cases in which there is clear and present danger); and 2) in requiring reporting for *all* gunshot and stab wound situations, regardless of whether or not a clear and present risk to anyone's health and safety can be determined – e.g., even in cases in which no danger is present or probable, and the interest is simply in prosecution or general societal improvement/deterrence, not immediate protection. It is my view that the privacy rights afforded by HIPA should not be violated in the indiscriminate and mandatory fashion proposed by the Bill solely on grounds of *identifying* criminals. As for cases of clear and present danger to the health and safety of Saskatchewan citizens, as above, HIPA already contemplates those.

INJURED PERSONS MAY BE DETERRED FROM SEEKING MEDICAL TREATMENT

I understand that proponents of Bill 20 or similar legislation elsewhere contend that such mandatory reporting will not deter injured persons from seeking treatment. I have not seen compelling or persuasive arguments in support of this claim. It has been suggested in various fora that Ontario has not experienced a decline in patients seeking care because of its similar law. I note that Ontario's law was only proclaimed on September 2, 2005, leaving very little time for conclusions to be drawn. Furthermore, determining the number of people deterred from seeking care because of Ontario's Act would be difficult at the best of times, given that such analysis would require finding out about individuals who don't present for treatment. In fact, an apparent reduction in crime attributed to the new law could in fact be a reduction in those seeking care. It has been suggested that there have been no adverse effects caused by similar legislation in the USA. To the contrary, I have been informed that some US jurisdictions have allowed their mandatory reporting laws to lapse due to low rates of reporting associated in particular with cases of domestic violence.

LACK OF CORRELATION BETWEEN TYPE OF WOUNDS AND CRIMINAL ACTIONS

It seems illogical that every individual who presents at a hospital with a puncture wound is the victim of a criminal assault. Yet, is it not likely that to avoid a violation of Bill 20,

hospitals will err on the side of reporting all wounds that could possibly be a consequence of a stabbing or a gunshot? I note there is no provision for the information collected by police to be destroyed or purged from police databases in the event that subsequent investigation reveals that the wound was neither a stabbing nor gunshot wound. Accidents happen with both firearms and knives. The indiscriminate collection, without consent of the individuals involved, means that the phi of persons who have been injured as a consequence of a genuine accident will end up in police databases. As elaborated on below, since phi in the possession of local police is not captured by our provincial access and privacy laws, it can be kept indefinitely, used for collateral purposes and disclosed to third parties for all kinds of purposes. All of this could happen without any notice to the individual, any right to find out what those uses or disclosures have been and certainly without any consent from the individual.

HEALTH INFORMATION OF VICTIM-WITNESSES COLLECTED WITHOUT THEIR CONSENT

It is important to note that those individuals whose phi stands to be collected under this Act need not have committed a criminal act. While it may be that the individual with the stab or gunshot wound may be a wrongdoer, that is not in any way a requirement for the exercise of these new statutory powers. It seems questionable that innocent citizens need surrender their privacy and any control they would otherwise have over their most sensitive and personal information, i.e. their own phi, in order that offenders be apprehended. I have seen no hard evidence that establishes that this invasion of the privacy of many individuals is proportionate to the possible identification and apprehension of criminals. And as noted earlier, Bill 20 may also cause patient reticence in communicating openly regarding their health history, thereby compromising their care.

LOCAL POLICE SERVICES NOT BOUND BY ACCESS & PRIVACY CONSTRAINTS

One of the elements in Bill 20 that is troubling is that it significantly enlarges the right of local police services to gather phi. What makes this troubling is that at the same time that the 'information gathering net' is enlarged, there is no corresponding oversight to prevent excesses, abuse of that process or misuse of that information once collected. If the local police service is a detachment of the RCMP, both the federal *Access to Information Act* and the federal *Privacy Act* apply to the phi that would be gathered subject to Bill 20. That enables an aggrieved citizen to complain to an independent officer of Parliament who has broad investigative powers to determine whether there has been compliance with the applicable law. Those quasi-constitutional laws such as the *Privacy Act* and the *Access to Information Act,* however, do not apply in the case of any municipal police service. Also, unlike almost all other Canadian provinces, our provincial access to information and privacy laws (*The Freedom of Information and Protection of Privacy Act* (FOIP) and *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP)) do not apply to municipal police services. The consequence is that citizens are denied the right they would otherwise have to seek a review by an independent officer of the Legislative Assembly of any collection, use or disclosure of the citizen's phi when in the possession of police. Citizens are effectively denied any statutory right to access the information the police agency has received about them or to request that errors be corrected.

In addition, I note that the Bill does not address precisely what would be permitted uses or disclosures of the phi collected under its authority. It also does not address how police services would protect the information from improper use or disclosure and how that would effectively be overseen by a body independent of Executive Government and independent of the police services.

CONCLUDING REMARKS

If the Assembly chooses to proceed with Bill 20 then I would strongly urge that immediate attention be given to bringing municipal police services under the scope of either FOIP or LA FOIP.

If Bill 20 is adopted by the Assembly, I would encourage, at minimum, an amendment to require that the regional health authority provide individuals with written notification of the phi that was disclosed without their consent, to whom the information was disclosed and the legal authority relied on by the regional health authority in making that disclosure.

Yours truly,

Gary Dickson
Saskatchewan Information and Privacy Commissioner